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# In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 552

THE YOUNGSTOWN SHEET & TUBE COMPANY, REPUBLIC Steel Corporation, Sharon Steel Hoop Company, et al., appellants

*v.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, the Baltimore & Ohio Railroad Company, et al., appellees

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO*

**BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION**

## OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 128) is reported in 7 F. Supp. 33.

The report of the Interstate Commerce Commission, hereinafter called the Commission, (R. 23) of which the order involved is made a part (R. 15, 40) is reported in 197 I. C. C. 617.

## JURISDICTION

The final decree of the District Court was entered June 8, 1934 (R. 148). Petition for appeal was filed August 1, 1934 (R. 161) and allowed the same day (R. 173). The appellees base the jurisdiction of this Court upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. Title 28, sec. 47) and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C. Title 28, Sec. 345).

## QUESTIONS

In an Investigation and Suspension proceeding (Sec. 15 (7), Interstate Commerce Act) involving so-called ex-river transportation of coal (i. e., transportation as to which there had been a previous barge movement) the Commission cancelled proposed carload rates of $1.02 per net ton from the river transfer points of Conway and Colona, Pa., to Youngstown, Ohio, but without prejudice to the filing of rates of 77 cents, which level of rates was found to be reasonable although no order [1] was entered. After some delay the railroads established rates of 77 cents per net ton but, subsequently, upon rehearing of the proceeding, asked to be allowed to establish rates of $1.01, they together with certain intervening inland coal mines introducing further

[1] The ex-river transportation service in question was a new and untried service.

evidence showing that the 77-cent rates were unreasonably low and unduly preferential of river mines. The Commission's order, entered in the reopened proceeding, prescribed rates of 90 cents per net ton as minima and certain differentials to be maintained between said ex-river rates and rates from inland mines to Youngstown. The Youngstown Chamber of Commerce and three steel companies, consumers of coal at Youngstown (one of which was owner, through a subsidiary, of a river mine) brought suit to set aside the Commission's order. The railroads, against which the order was directed, did not join as plaintiffs in the suit but, on the contrary intervened as defendants in support of the order. The lower court, assuming, "without deciding", that plaintiffs had standing to maintain the suit, upheld the Commission's order on the merits. The railroads established rates at the minimum named and said rates have been in effect since June 19, 1934. The questions presented are:

1. Whether appellant consumers and shippers have standing, in their own right, to maintain a suit against the United States and the Commission to set aside an order of the latter running against the railroads and directing them, as common carriers for the whole public, to publish, and maintain *in futuro*, rates as prescribed.

2. Whether the appeal does not present moot issues because "a judgment in appellants' favor would be futile" (*Sprunt* v. *U. S.*, 281 U. S. 249),

in that it would not operate to require the railroads to restore the former rates or to establish any other rates.

3. Whether the Commission's order is not in all respects a valid order, entered after full hearing accorded appellants and all other parties to the Commission proceeding and fully supported by evidence and findings.

## STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are printed in the Appendix.

## STATEMENT

This is a direct appeal from the final decree of a specially constituted District Court for the Northern District of Ohio dismissing a suit against the United States and the Commission brought by the Youngstown Chamber of Commerce and three companies, consumers of coal at Youngstown, to set aside a portion of an order of the Commission which directs the railroads to increase certain freight rates on coal to Youngstown and other points in Ohio, and to enjoin the enforcement or carrying out of said portion of the order.[2] (R. 22–23.)

The Commission's order attacked was made December 5, 1933, in a proceeding entitled Investiga-

[2] The suit does not attack the integral portion of the same order which relates to rates from points on the Wheeling's river division to Cleveland, Lorain, Canton and Massillon.

tion & Suspension Docket No. 3282, *Coal, Bituminous, Ex-River, from Colona and Conway, Pa., to Youngstown, Ohio*, which proceeding also included Investigation & Suspension Docket No. 3619, *Ex-River Coal to Cleveland, Lorain, and Other Ohio Points.* (R. 23, 1540; 197 I. C. C. 617.)

**The Nature and Antecedents of the Commission's Order**

The order in question (R. 1541) was made upon a "further hearing" of the two proceedings above named. The following brief statement of the earlier proceedings is essential to an understanding of the final report and order.

The development by the Government of the system of locks and dams in the upper Ohio River system about 1928, caused producers in western Pennsylvania to formulate plans for the loading of their coal on barges at or very near to their mines and its transportation by water to points on the river where it could be loaded upon cars for delivery by railroad to interior consuming points. The mines in the region had previously been dependent solely upon the railroads for transportation of their coal, and a definite system of rate relationships from the various producing localities or "districts" had been established. To take care of this anticipated "ex-river" coal tonnage (as coal brought from the mine in barges was called), schedules were filed with the Commission proposing a proportional rate of $1.02 per net ton on ex-river

bituminous coal, in carloads, from Conway, Pa., over the Pennsylvania Railroad, and from Colona, Pa., over the Pittsburgh & Lake Erie Railroad, to Youngstown, Ohio, to become effective May 15, 1929. The Commission upon its own motion suspended the proposed schedules, pursuant to Section 15 (7) of the Interstate Commerce Act, and entered upon a hearing provided for therein, the proceeding being styled I. & S. Docket 3282, Coal, *Bituminous, Ex-River, from Colona and Conway, Pa., to Youngstown, Ohio,* referred to by the Commission in subsequent reports and herein as the "first ex-river case." Under the suspension by the Commission and the voluntary postponement by the carriers, the effective date of the proposed rates, pending the determination of the proceeding, was deferred until May 1, 1930. On March 27, 1930, the Commission made its report and order, in which it found that the proposed rate of $1.02 was not justified, but suggested that a reasonable maximum rail rate on this ex-river coal would be 77 cents to Youngstown, Warren, Ohio, and other points grouped therewith. The order required the carriers to cancel said schedules and the report recited that the Commission's action was without prejudice to the filing of new schedules prescribing a rate not greater than 77 cents. The Commission did not *require* the establishment of the 77-cent rate.

Subsequently the Wheeling System, composed of The Wheeling & Lake Erie Railway Company and

its subsidiary, the Lorain & West Virginia Railway Company, which had lines of railroad touching the Ohio River at points south of Colona and Conway, filed schedules to become effective July 22, 1931, proposing to establish rates upon ex-river bituminous coal from certain river points upon its lines, of 95 cents to Canton and Massillon, Ohio, and $1.10 to Cleveland, Lorain and South Lorain, Ohio. Competing rail carriers and certain producers protested, and the proposed schedules were suspended by the Commission until January 22, 1932. The Commission entered upon a hearing as to the lawfulness of the proposed rates, the proceeding being known as I. & S. Docket No. 3619, *Ex-River Coal to Cleveland, Lorain and Other Ohio Points.* Pending the hearing the Wheeling voluntarily postponed the effective dates of its schedules until June 22, 1932. (R. 85.) On May 31, 1932, the Commission made its report and order in said proceeding, finding that the suspended schedules had not been justified, but "without prejudice to the filing of new schedules naming rates of $1.02 to Canton and Massillon, and $1.27 to Cleveland, Lorain and South Lorain, to apply on ex-river coal originating at mines on the Monongahela, Ohio and Allegheny rivers." This proceeding is referred to by the Commission in its subsequent report and herein as the "second ex-river case."

It will be noted that in neither the first nor the second ex-river case does the Commission *order* the establishment of the suggested rates. The

Commission's suggestions were, however, carried out by the railroads in the establishment of the rates named, to be effective July 16, 1932.

A substantial volume of tonnage began to move under the ex-river rates established by the carriers under the conditions aforesaid. Reductions in Ohio intrastate coal rates, required, authorized, or permitted by the Ohio State Commission, resulted in a 13th section proceeding wherein the Commission ordered increases in the Ohio intrastate rates, which orders were attacked in court proceedings in which the Commission's orders were finally sustained. (See *Intrastate Rates on Bituminous Coal within Ohio,* 192 I. C. C. 413 (R. 1545); *Surcharge on Bituminous Coal within Ohio,* 192 I. C. C. 734; *State of Ohio et al.* v. *United States,* 6 F. Supp. 386; 292 U. S. 498.)

While the above cases were pending, all the participating carriers, with the exception of the Wheeling, filed with the Commission two successive petitions under Section 16a of the Interstate Commerce Act, praying a rehearing of the two ex-river cases above described. The second petition was granted (R. 1514) and the "further hearing" which resulted in the report and order attacked in this case was had.

In the "further hearing" the two I. & S. proceedings above described were consolidated and the Commission heard 397 pages of additional testimony and received 71 additional exhibits. The

parties submitted elaborate briefs and oral arguments before the entire Commission. (R. 141.) Upon the separate records previously made in the proceedings, supplemented by additional record made in the consolidated hearing, the Commission on December 5, 1933, made its report and the order attacked in this case, (R. 23, 1540) in which the Commission affirmed its former findings that the original schedules proposed by the carriers were not justified, and found that the then existing rates (which the Commission had previously suggested and the carriers had voluntarily put into effect July 16, 1932) were unreasonably low and were unduly prejudicial to operators of inland mines and preferential of river mines. In its order the Commission directed the carriers to establish rates not less than 90 cents from Colona and Conway to Youngstown, $1.20 from the Wheeling's river points to Canton and Massillon, and $1.45 to Cleveland and Lorain. Carriers upon whose petition the Commission granted the rehearing, had urged much higher rates than those finally prescribed by the Commission. The Commission further prescribed certain differentials between the ex-river rates from the river points and all rail rates from the respective mining districts.

In its report (R. 24) the Commission recited the history of the two proceedings which had been reopened, pointing out its fixed purpose throughout to preserve a fair and consistent rate structure on coal throughout the region involved. (See quo-

tations from the first and second ex-river cases, R. 25, 26.) The Commission calls attention to the fact that in reaching its conclusions in the reopened cases it had available data regarding the actual effects of the new ex-river service at the level of rates upon which it was inaugurated. The Commission points out that the establishment of the low ex-river rates previously approved in the first and second ex-river cases had been followed by reduction of Ohio intrastate rates, and by action of the Commission relative to intrastate rates under Section 13 of the Interstate Commerce Act. (R. 27, 28, 1565–70.) The report reads (R. 28–29, 197 I. C. C. 621):

> * * * A discussion of the effects of the ex-river rates appears in the *Ohio case,* and substantially the same evidence brought further down to date was introduced at the present hearing. It was shown in the *Ohio case* and mentioned in the former reports in the present proceedings that a number of mines, known as river mines, are on or adjacent to the Monongahela, Allegheny, and upper Ohio Rivers. Most of these mines are of the captive class and ship their coal by river to affiliated iron and steel companies in the Pittsburgh, Steubenville and Wheeling districts. These mines are principally in the Connellsville district; some are in the Pittsburgh district. Thirty per cent of the production in the western Pennsylvania districts can move originally by

barge, the other 70 percent is restricted to the all-rail routes.

Inland coal producers testified as to their great disadvantage in selling coal in northeastern Ohio in competition with river mines that use the ex-river rates. Some of these producers have lost their business entirely in this destination territory, and others testify that if the present ex-river rates are continued their competitors having access to the rivers will completely exclude them from the important markets in northeastern Ohio having ex-river rates.

As to the Wheeling's position, the Commission said (R. 30; 197 I. C. C. 622):

> The Wheeling opposes any increase in the present rates from its River division to the destinations under consideration. Comparisons are made between the ex-river rates suggested by petitioning carriers, other than the Wheeling, and the all-rail rates prescribed in the *Ohio case* for somewhat similar distances * * *.

Immediately following the above the Commission states the distances and rates, both all-rail and ex-river, from the Wheeling's river division to western and central Ohio consuming points, and from points in the Pennsylvania fields to Youngstown and Cleveland.

The report discusses some of the rate comparisons of record advanced by the railroads in support of the proposed ex-river rate of $1.01 from Colona

and Conway to Youngstown, and, among other things, compares the all-rail rate basis with said proposed $1.01 ex-river rate and the existing rate of 77 cents, as follows (R. 32):

> The all-rail rate from the Pittsburgh district, the base group, to Cleveland, 162 miles, is $1.84, and to Youngstown, 96.5 miles, $1.34, and these rates were approved in the *Ohio case*. Comparisons were made in the former reports herein with the scale prescribed in *Holmes & Hallowell Co.* v. *G. N. Ry. Co.*, 69 I. C. C. 11, hereinafter termed the H. & H. scale. The $1.84 rate from the Pittsburgh district to Cleveland is about 93.5 percent of the H. & H. scale; the rate to Youngstown 92.5 percent.
>
> The ex-river rate of $1.01 proposed from Conway and Colona to Youngstown is substantially 100 percent of the H. & H. scale. The rate of 77 cents previously approved from and to these points is about 82 percent of the H. & H. scale for distances of 30 to 40 miles, and 75 percent of that scale for distances of 40 to 50 miles. As previously stated, the weighted-average haul is 42 miles. * * *
>
> The ex-river rates suggested by petitioners are consistent with the all-rail rates prescribed or approved by us for application in this same general territory both in the *Ohio case* and in other cases. The suggested rate of $1.01 from Conway and Colona to Youngstown is also compared with the all-

rail rate of $1.04 from the Leetonia group to Youngstown, for about the same distance, a portion of this origin group lying geographically between Conway and Colona, on the one hand, and Youngstown on the other.

The 90-cent minimum rate prescribed and established lies in between the proposed $1.01 rate and the former 77-cent rate, and observes a differential of 44 cents under the key rate from the Pittsburgh district as provided for by the order. (R. 1542.)

The Commission's report also refers to the switching and classifying service at river points and the terminal service at Youngstown, which are important items of costs entering into the rate on the short 42 mile haul. (R. 39, 43, 40, 41.) As indicative of the costs of switching at Youngstown, in instances where the service is performed by other than the line-haul road the switching charges at Youngstown absorbed under the 90-cent rate range from $2.70 per car to 19 cents per ton. (R. 41.)

The report states that it is difficult to compare the all-rail rates with the total through charges on the traffic that moves ex-river. At Conway and Colona (the transfer points here involved) the charge for transferring coal from barges to cars is established at 12 cents per net ton in the tariffs of the Pennsylvania and Pittsburgh & Lake Erie. As to the barge charges for the river movements

to said transfer points from mines in the Pittsburgh and Connellsville districts, 25 cents appears to be the most representative charge (R. 36, 37, see note 2 to table in report R. 37). Contentions as to greater costs were made based on an estimate from one river mine near Wheeling, W. Va., and exhaustion of the mine in 12 years. On the other hand the Commission said (R. 37):

> One company charges 25 cents for moving coal in single barge lots from mines in the Connellsville and Pittsburgh districts to Conway and Colona for distances as great as 107 miles. As this charge is for single barge lots, petitioners contend that it is not probative of the charge on steady and increased tonnage. They testify that this contention is supported by comparisons of bids obtained by the city of Cleveland for an annual supply of 100,000 tons of coal. The destination bids on this tonnage reflected a difference of 26.5 cents in favor of barge-rail as compared with all-rail movement on the same coal from the same mine, and allowed for a barge charge of only 8.5 cents from the Connellsville district to Conway and Colona. * * *.

However, taking the 25-cent barge charge as "indicative" (see Note 2, Table R. 37) and adding to that the transfer charge of 12 cents and the former ex-river rate of 77 cents, the total charges of $1.14 may be compared with the key rate (all-rail) of $1.34 from the Pittsburgh district and the all-rail

rate of $1.42 from the Connellsville district, both to Youngstown.[3]

But it is the ex-river rate of 77 cents, in and of itself, with which the Commission's report particularly deals. It was that rate which was found unreasonably low; and it was that rate which was found unduly preferential of river mines and unduly prejudicial to inland mines. And it was by reason of the fact that it was unreasonably low and unduly preferential that it had played its distinct part in an important breaking down of the rate structure. (R. 27, 45.)

The report describes the competitive relationship existing between the river mines and the inland mines and specific instances are cited of inland mines being deprived of most of their business by the low ex-river rates. (R. 41, 44; 197 I. C. C. 631, 633.)

The great volume of the coal shipments and the consequent importance of establishing and maintaining proper rate adjustments and relationships is stressed, figures being given as to the negligible amount of ex-river tonnage prior to the establishment of the ex-river rates and the immediate and rapid growth of the traffic thereafter. (R. 41–42; 197 I. C. C. 630–631.) Reference is made to the

[3] This comparison of charges is supplied because the table in the Commission's report (R. 37) happens not to include comparison, barge and ex-river with all-rail, to the destination of Youngstown, particularly involved in that portion of the order attacked in court.

decline in net carrier revenues during the few years preceding. The Commission's report concludes (R. 45) that—

> * * * the record establishes that the present ex-river rates have, in a great measure, deprived the inland mines of their former markets in northeastern Ohio. Our power to correct this situation has been invoked in the present proceeding and should be exercised to the extent of our authority under the law. The record also fully establishes that the maintenance of the present ex-river rates has tended to disrupt the rate adjustment in this territory and jeopardized the revenues of the rail carriers. The view was expressed in the *Ohio case* that the difference between the ex-river rates and the all-rail basis of rates was too great. The evidence indicates that the ex-river rates are too low and for that reason are unreasonable. The Supreme Court said in *Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, at page 511: "Now the rate may be unreasonable because it is too low as well as because it is too high." Furthermore, in *Jefferson Island Salt Mining Co.* v. *U. S.*, 6 Fed. (2d) 315, we were sustained in prescribing minimum rates to preserve reasonable rate relationships.

The specific findings of the Commission were as follows (R. 45–46):

> We affirm the former findings in these proceedings that the schedules there proposed are not justified. We, however, modify the

additional findings in the former reports and find that the ex-river rates assailed are unreasonably low to the extent that they are or may be less than the following: From Colona and Conway to Youngstown 90 cents, and from the Wheeling's River division transfer points to Canton and Massillon $1.20, and to Cleveland, Lorain, and South Lorain $1.45; to apply on ex-river coal originating at mines on the Monongahela, Allegheny, and Ohio Rivers, transferred from river barges or boats to railroad cars, when for track delivery at the destinations named above; said rates to be subject to a minimum of 50,000 pounds; and that the findings herein are without prejudice to the establishment of an ex-river rate of 90 cents from Colona and Conway to Youngstown, and ex-river rates from the points named herein on the Wheeling's River division of $1.20 to Canton and Massillon and $1.45 to Cleveland, Lorain, and South Lorain, and said rates to be subject to a minimum of 50,000 pounds.

We further find that the maintenance of ex-river rates from Colona and Conway, and from transfer points on the Wheeling's River division to the destinations under consideration or any basis less than hereinafter indicated will constitute undue prejudice against operators of inland coal mines located in the Freeport, Pittsburgh, Connellsville, and Fairmont districts, and undue preference of operators of mines located on the Monongahela, Allegheny, and Ohio

Rivers transferring coal from barges to respondents' rails at Conway, Colona, and at transfer points on the Wheeling's River division to the extent that:

The ex-river rates from Colona and Conway to Youngstown may be less than those based on 44 cents under the contemporaneous all-rail rates maintained by respondents on like traffic from the Pittsburgh district to the same destination, and 44 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district, from Freeport, Connellsville, and Fairmont districts to the same destination; and the ex-river rates from the Wheeling's River division transfer points to Canton, Massillon, Cleveland, Lorain, and South Lorain may be less than those based on 39 cents under the contemporaneous all-rail rates maintained from the Pittsburgh district to the same destinations, and 39 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district from Freeport, Connellsville, and Fairmont districts to the same destinations.

The Commission's order was as follows (R. 1540–42):

It appearing that by order dated May 8, 1933, the Commission, upon consideration of the second petition of The Baltimore and Ohio Railroad Company et al., reopened the above-entitled proceedings for reconsideration and rehearing;

It further appearing that such rehearing has been had and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered that respondents, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 15, 1934, and thereafter to abstain from publishing, demanding, or collecting their present ex-river rates for the transportation of bituminous coal in carloads, from Colona and Conway, Pa., to Youngstown, Ohio, and from river transfer points on the Wheeling & Lake Erie Railway Company's river division in Ohio to Canton, Massillon, Cleveland, Lorain, and South Lorain, Ohio, which are found in said report to be unreasonably low, unduly prejudicial and unduly preferential.

It is further ordered that respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 15, 1934, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of ex-river coal originating at mines on the Monongahela, Allegheny, and Ohio Rivers, transferred from river barges or boats to railroad cars, when for track delivery at destination,

minimum 50,000 pounds per car, rates which shall not be less than the following: From Colona and Conway, Pa., to Youngstown, Ohio, 90 cents per net ton; and from transfer points in Ohio on the River division of the Wheeling and Lake Erie Railway Company to Canton and Massillon, Ohio, $1.20 per net ton, and to Cleveland, Lorain, and South Lorain, Ohio, $1.45 per net ton.

It is further ordered that said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before February 15, 1934, upon notice to this Commission and the general public by posting and filing in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of bituminous coal, in carloads, ex-river rates from Colona and Conway, Pa., and from transfer points on The Wheeling and Lake Erie Railway Company's River division in Ohio, to the destinations hereinafter indicated, which shall not be less than the following: From Colona and Conway to Youngstown 44 cents under the contemporaneous all-rail rates maintained by respondents on like traffic from the Pittsburgh district to the same destination and 44 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district from Freeport, Connellsville and Fairmont districts to the same destination, and from the Wheeling and Lake Erie Railway Com-

pany's River division transfer points to Canton, Massillon, Cleveland, Lorain, and South Lorain, 39 cents under the contemporaneous all-rail rates maintained from the Pittsburgh district to the same destinations, and 39 cents plus or minus, as the case may be, the present existing differentials over or under the rates from the Pittsburgh district from Freeport, Connellsville, and Fairmont districts to the same destinations.

And it is further ordered that this order shall continue in force until the further order of the Commission.

The development of the rates in question, stated in tabular form, is shown below:

| | Distance [1] | Per 2,000 pounds | | | | | |
|---|---|---|---|---|---|---|---|
| | | Rates originally proposed | Rates voluntarily established as suggested by Commission [2] | Earnings | Rates proposed at rehearing | Earnings | Minimum rates prescribed on rehearing [3] |
| From Conway and Colona, Pa., to— | *Miles* | *Cents* | *Cents* | *Mills* | *Cents* | *Mills* | *Cents* |
| Youngstown, Ohio | 41.9 | 102 | 77 | 18.38 | 101 | 24.1 | 90 |
| Warren, Ohio | 58.4 | 102 | 77 | 13.65 | 101 | 17.9 | 90 |
| From other Ohio River points [4] to— | | | | | | | |
| Cleveland, Ohio | 144.3 | 110 | 127 | 8.80 | 174 | 12.06 | 145 |
| Lorain, Ohio | 149.3 | 110 | 127 | 8.51 | 174 | 11.6 | 145 |
| South Lorain, Ohio | 147.7 | 110 | 127 | 8.60 | 174 | 11.1 | 145 |
| Canton, Ohio | 86.6 | 96 | 102 | 11.75 | 126 | 14.5 | 120 |
| Massillon, Ohio | 83.7 | 96 | 102 | 12.19 | 126 | 15.0 | 120 |

[1] Average distance via all tariff routes.

[2] Put into effect July 16, 1922.

[3] Put into effect June 19, 1924, after dismissal of the petition and dissolution of temporary injunction. (R. 148.)

[4] Wheeling & Lake Erie Railway Company's River division: Bellaire, Bridgeport, Brilliant, Martins Ferry, Mingo Junction, Rush Run, Salt Run, Steubenville, Stringer, Terminal Junction, Tiltonville, Warrenton, and Yorkville, Ohio.

**Proceedings in the District Court**

On January 29, 1934, before the minimum rates prescribed by the Commission had gone into effect, appellants brought this suit in the District Court to set aside that portion of the order which prescribed the 90-cent rate from Colona and Conway to Youngstown (Appellants' Brief, p. 2). The United States and the Commission were the only defendants named. A similar suit praying the same relief was brought in the same court by Valley Camp Coal Company and other owners of river mines, and the two cases were heard and decided together. (See District Court's opinion, R. 128, and Findings of Fact, R. 142–143.) Plaintiffs in the Valley Camp Coal Company case have not appealed from the decree dismissing their suit.

The prayer of the petition (R. 23) was that the order of December 5, 1933, be adjudged unlawful, and set aside and annulled. Plaintiffs further prayed a decree "permanently enjoining the United States of America and the Interstate Commerce Commission, and all persons acting for and on their behalf, or on their authority, or the authority of said order, from taking any steps to enforce or carry out said order."

It is not clear whether the language above quoted was originally intended by plaintiffs to include a prayer for an injunction against the railroads, forbidding them to charge the prescribed new rates, but the restraining order issued pending

the decision of the case is specifically so worded. (R. 126–127.)

In the petition as originally filed, the plaintiffs objected to the new rates prescribed by the Commission upon the sole ground that they *were higher* than those suggested by the Commission in its previous reports and subsequently put into effect by the carriers. (R. 14.) At the hearing the plaintiffs amended their petition so as to allege that the prescribed rates would compel them "to pay a rate *which is unreasonably high and unlawful.*" (R. 100.)

The United States and the Commission filed separate but similar answers, asserting, first, that plaintiff shippers had no standing to bring their independent suit to set aside the Commission's order and to enjoin the carriers from establishing the prescribed rates, and second, that the action of the Commission was lawfully and fully supported by the evidence. All the carriers affected by that part of the order attacked, as well as the owners of some of the inland mines, intervened as defendants and prayed the dismissal of the suit upon substantially the same grounds as were stated in the answers of the United States and the Commission. (R. 101–125.)

The case was heard by the three-judge court on March 10, 1934. In addition to relevant reports and orders of the Commission, the plaintiffs introduced in evidence certified copies of the record of

proceedings before the Commission in the first and second ex-river cases, I. & S. Dockets No. 3282 and No. 3619, and on further hearing of the cases consolidated. Plaintiffs also introduced an affidavit tending to show that the increase in rates would result in additional expense to the plaintiffs. (R. 1543.) There was no opposing evidence except affidavits offered by intervening owners of inland mines showing loss of competitive business to river mines because of low ex-river rates. (R. 149–161.)

After submission of the case and pending decision, the Court, on April 13, 1934, issued its restraining order against the enforcement of the Commission's order by it, and against the railroads, forbidding exaction of the rates prescribed until further order of the Court. (R. 126.)

On May 12, 1934, the Court handed down its opinion and accompanying "Findings of Fact and Conclusions of Law." (R. 128–148.) The Court was "content to assume without deciding" (R. 132) that the plaintiff shippers had legal standing to originate the suit; it did not itself attempt to decide the reasonableness *per se* of the new rates prescribed, which plaintiffs in their amendment to the petition alleged to be unreasonably high. The Court found (R. 147) that the Commission's order in question was supported by all findings essential to its validity; that the findings were amply supported by substantial evidence, and that none of

the grounds of invalidity asserted by the plaintiffs was well founded.

Final decree was entered June 8, 1934, vacating the temporary restraining order, denying the prayer for interlocutory and permanent injunction, and dismissing the petition for want of equity. (R. 148.)

Shortly after the dissolution of the restraining order all the railroads established the prescribed rates.

## SUMMARY OF ARGUMENT ON JURISDICTION

The Interstate Commerce Act vests shippers with many rights which are directly enforceable in court, some by the government on their behalf[1] and some assertable by individual shippers.[2] But their right to the enjoyment of reasonable and nondiscriminatory rates *in futuro,* either as advanced in support of a change in rates or as against a change in existing rates, is necessarily not assertable as a legal right in the courts. This was recognized by the framers of the Act conferring jurisdiction upon the courts to enjoin and set aside orders of the Commission, in that it is designed as a jurisdiction to investigate whether the Commission had exceeded its statutory authority or acted

[1] Important, among many others, is the right to have rates, open to all alike, published and posted by the carriers and strictly adhered to.

[2] *Skinner & Eddy* v. *U. S.*, 249 U. S. 557; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42; *U. S.* v. *Village of Hubbard*, 266 U. S. 474; *Warehouse Co.* v. *U. S.*, 283 U. S. 501.

arbitrarily, and to give to the courts power, on such grounds, simply to set aside the order without interference otherwise with the administrative processes or workings of the Interstate Commerce Act. Compare *Procter & Gamble* v. *U. S.*, 225 U. S. 282, at p. 293. Of what use would it be to shippers bringing independent suits to set aside orders with which the carriers purposed to comply, for the courts to relieve the carriers "from the duty of obedience" (idem) unless the courts' decrees could do more, that is, operate directly upon the rates or restrain the carriers' initiative? Compare *Sprunt* v. *U. S.*, 281 U. S. 249, 255, 256. On the one hand, decisions in such independent suits, that the Commission had misconceived its authority, or acted without substantial evidence or essential findings in issuing its orders could supply grounds only for setting aside the orders and not for imposing restraint upon the carriers. The decisions would thus be merely "advisory", that is, extra-judicial. On the other hand, as bases for decrees operating directly on the rates or the carriers' rate initiative, there would have to be findings by the Courts as to the justness and reasonableness of the rates. Decrees of the Courts (made permanent and affirmed by this court) operating directly on the rates, or on the carriers' rate initiative, would be destructive of the Act's administrative processes and workings and would, it seems inescapable, constitute the exercise of functions "essentially legislative or ad-

ministrative." Compare *Radio Commission* v. *General Electric Co.*, 281 U. S. 464, at p. 469.

As distinguished from the extension by carriers of their lines or operations which is rigidly forbidden by the Act (Sec. 1 (18), (20)) unless Commission authority is first obtained, both in fact and as an authority validly issued (*Claiborne-Annapolis Ferry* v. *U. S.*, 285 U. S. 382, 392), the Act does not prohibit the carriers from changing their rates without Commission authority but, on the contrary, leaves with them the right to make changes in their rates on thirty days' notice (Sec. 6 (3)), subject to the provisions of the Act (Sec. 15 (7)), that the Commission may, either upon complaint or its own initiative, enter at once upon a hearing with the same authority as in a proceeding after the rates had become effective, and, if it does so, may from time to time suspend such rates, but not for more than seven months. In short, there is no statutory mandate that the carriers may not change their rates unless first obtaining from the Commission an order or authority, validly issued after full hearings.

In the present case the Commission's order required the establishment of minima rates of 90 cents per net ton. The carriers did not join with appellants as plaintiffs in the suit in the lower court but, instead, showed their purpose to establish rates at that level by filing them and intervening in support of the Commission's order. Appel-

lant consumers, or shippers, of coal had an interest in the continuance of the lower 77-cent rate which had entitled them, along with others of the consuming and shipping public served by the carriers (some having the same and some having divergent interests) to be heard by the administrative body on the question of rates to be maintained *in futuro*. But appellants could assert in court no legal right to have maintained either the 77-cent rate or any other particular rate, on which could be based a judicial decree operating on the rates, either directly or through the carriers. And appellants could assert no legal right of their own as having been violated by the order's command upon the carriers, properly entitling them to maintain an independent suit to set aside the order. Legally appellants' position was no different than it would have been if the carriers had filed the rates without an order. The setting aside by the lower court of the order to establish the minima 90-cent rates would not have revived any statutory duty of the carriers to maintain existing rates; for there is no such duty. Compare *Claiborne-Annapolis Case, supra.*

Moreover, the lower court, assuming for the purposes of the case at least that it had jurisdiction, upheld the order on the merits, dismissed the bill, and vacated its temporary restraining order. Thereafter the carriers established the rates and they have been in effect since June 19, 1934. In the *Sprunt Case, supra,* the shippers lost "standing"

upon failure of the carriers to join with them in the appeal, and the fact that the rates were thereafter established was further held to render the matter moot insofar as relating to appellant shippers. Similarly as in that case, it is apparent that here a mandate of this Court directing the lower court to set the Commission's order aside would not restore the former rates. In this connection it is again emphasized that the carriers' rate initiative is not restricted by rigid statutory requirement for hearings and an order of the Commission before changes in rates may be established; the invalidating of the order would bring to life no duty of the carriers to reestablish preexisting rates. And as for the lawfulness of the rates which the carriers have now made effective in their tariffs: that question can no more be directly raised in court in respect of the rates in question than it could be in respect of any other of the carriers' established rates.

## SUMMARY OF ARGUMENT ON MERITS

The Commission's order prescribing minima exriver rates of 90 cents per net ton from Conway and Colona, Pa., to Youngstown, Ohio, and fixing a differential based on key rates in the coal rate structure, was in all respects a valid order. The case is not, as appellants assert, like *United States* v. *C., M. St. P. & P. R. Co. et al.,* (decided March 4, 1935) other than that there was a finding in respect of disruption of the rate structure and preservation

of carrier revenue. The carriers were not proposing reduced rates to restore a lost parity but were advocating that rates below the basis of the general rate structure be increased to that basis because they " had and did now menace " the general coal rate structure, and that they were entirely too low measured by every proper standard.

The Commission's order for establishment of a 90-cent minimum rate allowed part of the increase to the basis of the rail rate structure. The Commission, at the same time, stated that the rates at the level of $1.01 asked for by the carriers were not inconsistent with the all-rail rates which it had approved and prescribed in the same general territory.

Even confining consideration to the Commission's finding that the former ex-river rate of 77 cents had tended to disrupt the rate structure and deplete the carriers' revenues, the present case is markedly distinguishable from the *Milwaukee case,* not only in the above particulars but because the low ex-river rates had in fact played a distinct part in an important crumbling of the general rate structure; and the Commission's report contains a great deal of discussion (supported by much evidence) showing its conviction that the losses in revenue from continuing the low rates in effect would be very serious.

But the chief distinctions are that in the present case the rates were found in and of themselves un-

reasonably low; that it was because they were too low that they were unduly preferential to the river mines and unduly prejudicial to inland mines; and that it was because of both of these basic elements of unlawfulness that the rates had been and continued to be a menace to the rate structure, and to adequate carrier revenue to maintain the transportation service. The report contains full discussion with respect to the reasonableness of the rates *per se*. It contains findings which unmistakably show the Commission's judgment that they were too low *per se*. The supporting evidence was not alone that on their face they were much lower than the basis of the general rate structure but there was much other evidence and testimony to substantiate that showing.

The Commission's conclusion that the rates were unduly preferential of river mines and unduly prejudicial of inland mines is supported by findings of similarity in circumstances, competitive conditions, testimony, and evidence of lost business and expectations of being entirely deprived of business at the destination points. The whole report substantiates the conclusions reached.

## ARGUMENT ON JURISDICTION

The Commission's order prescribed minima ex-river rates of 90 cents per net ton and a differential to be observed between rates from inland mines to the same destination, it being supported by findings that the existing rates were unreasonably low,

and unduly preferential of river mines and unduly prejudicial to inland mines. Appellants are consumers or consignors of coal at the destination Youngstown, appellant Youngstown Sheet and Tube Company also being owner, through a subsidiary, of a "captive" river mine. The carriers, against which the order is directed, did not join with appellants in the suit in the lower court but, instead showed their purpose to establish rates at the 90-cent level by filing schedules and intervening in support of the Commission's order. During pendency of the suit the effective date of the rates was postponed, once voluntarily and later by restraining order of the court. Following the entry of the court's decree dismissing the bill and vacating the restraining order, the schedules were canceled by new schedules which established the 90-cent rates, effective June 19, 1934.

In *Sprunt* v. *United States,* 281 U. S. 249, which involved an order of the Commission prescribing rates for removal of undue preference of waterfront cotton compress and warehouse plants and undue prejudice to "up-town" plants, Sprunt, and other owners of waterfront plants brought suit to set aside the order. Certain of the railroads brought separate suit and the two cases were consolidated as a single cause. Following dismissal of the bill by the lower court the carriers acquiesced in the decision and established the prescribed rates. The appeal was taken by Sprunt and other ship-

pers, one of the contentions being that there was no basis for the Commission's finding of undue preference and prejudice. This Court held that appellants had no standing in their own right to make this attack; that, while the order deprived them of a rate advantage, entitling them to intervene in the administrative proceeding and, as interveners there, entitling them as of right to intervene in a suit, to set aside the order, they had no independent right which was violated by the order, the advantage which they had enjoyed being

> merely an incident of, and hence was dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so.
>
> Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy. * * *

The Commission order reduced Sprunt's competitors' rates and increased Sprunt's rate one cent per 100 pounds (equal to 20 cents per ton).* The fixing of the rates to remove the discrimination was done on the basis of maintaining carrier revenues

* In the present case the increase in the ex-river rate was 13 cents per ton.

as it had been and without passing on reasonableness of the rates as increased or reduced. Sprunt was held to have no standing to raise the question as to whether the Commission may fix rates to remove discrimination without hearing and finding as to reasonableness, the court saying that "If the carriers had, of their own accord, adopted the plan later prescribed by the Commission, appellants could, obviously, not be heard to complain of the reasonableness of the rate adopted except in a proceeding before the Commission instituted under sections 13 and 15 of the Act."

The decision also held that the action of the carriers in establishing the rates had rendered the issue of undue prejudice and undue preference[1] moot, saying, among other things:

> There is nothing to show that any carrier is now in sympathy with the appellants' attack on the order. A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so.

The *Sprunt Case* announces no new principle. In *United States* v. *Merch. & Mfrs. Traffic Asso.*, 242 U. S. 178, 188, it was held that four interior cities in California, formerly enjoying the same

[1] There was no issue as to whether there was a proper basis for a finding of reasonableness because no such finding had been made.

rates as coastal cities, and which by a Fourth Section Order of the Commission were subjected to rates materially higher, had no standing to maintain a suit to set aside the order. Their bill, in addition to alleging that the order was without evidence, asserted that it denied them equal protection of the law and deprived them of their property without due process. (P. 185.) The lower court had enjoined the enforcement of the order and also enjoined and canceled the tariffs. In reversing the decree this Court said, among other things:

> * * * To permit communities of shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more. The decree of the District Court cancels the amended order and the tariff only so far as it concerns the four complaining cities and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities.

The last sentence of the above graphically pictures the results of judicial decrees issued at the instance of individual patrons of the carriers with respect to legislative or administrative matters. It is of particular significance in this case because that portion of the Commission's order prescribing minima rates from the Wheeling's river transfer

points to other destinations in northeastern Ohio is not under attack.

A recent reaffirmation of the *Sprunt Case* and mention of other cases is contained in *Moffat Tunnel League* v. *United States*, 289 U. S. 113, in which it was said at page 119:

> Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. *Edward Hines Trustees* v. *United States*, 281 U. S. 249, 254. *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486; *Sprunt & Sons* v. *United States*, 281 U. S. 249, 254.

The *Sprunt Case, supra*, pointed to the reason for the shipper's lack of standing, namely, that his right to the enjoyment of just and reasonable rates was not a legal right, saying:

> Appellant's present position is unlike that of the plaintiffs in the cases relied upon. *United States* v. *Village of Hubbard*, 266 U. S. 474; *The Chicago Junction Case*, 264 U. S. 258; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42. In each of those cases, an independent legal right of the plaintiff was affected by the order which it was sought to set aside.

As illustrative of the legal rights referred to: The *Diffenbaugh Case* involved the right to allowances given shippers by section 15 (13) of the Act

where they furnish facilities or services which are part of the transportation which a carrier is obligated to render under its rates. The standing of the shipper in *Warehouse Co.* v. *United States*, 283 U. S. 581, was based on the same provision of the Act. In *Skinner & Eddy* v. *United States, supra*, the right under the last paragraph of section 4 of the Act not to pay increased rates except when due to reasons other than the elimination of water competition was held to be the right of the shipper. The right of a State or its Commission to maintain a suit to set aside an intrastate order is because the order operates as a restraint on its sovereign power.

A scanning of the Act will reveal many other such legal rights. There are also many legal rights in the Act which are rights of the shipping public, although enforceable in court by the government rather than by individual shippers.

But the right of a shipper, producer or consumer, to the enjoyment of nondiscriminatory and reasonable rates, either as advanced in support of a change in rates or as against a change in existing rates, is necessarily not assertable as a legal right in the courts. Apparently appellants believe, as judged by their position in the lower court, that a distinction exists giving them a greater right in court in respect of reasonableness than in respect of unjust discrimination. As respects damages for past shipments, the weight of court authority in

this country prior to the act to regulate commerce recognized the right of equality of treatment as well as the right not to be charged excessive rates. *Penna R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 201; *Int. Com. Comm.* v. *B. & O. R. R.*, 145 U. S. 263, 275. And, in any event, what we are concerned with here is administrative or legislative action in respect of rates *in futuro* and, too, dealing with the justness as well as reasonableness. In *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 284 U. S. 370, it was said at page 383:

> The exaction of unreasonable rates by a public carrier was forbidden by the common law. *Interstate Commerce Comm.* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, 275. The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded.

In *Baer Bros.* v. *D. & R. G. R. R.*, 233 U. S. 479, it was said at page 486:

> 1. That the two subjects of Reparation and Rates may be dealt with in one order is undoubtedly true. *Texas & Pac. Ry.* v. *Abilene*, 204 U. S. 426, 446. *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506, 509. But awarding reparation for the past and fixing rates for the future involve the determina-

> tion of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent future injury to the public.

The carrier, as owner of the business, has a legal right in respect of a regulatory order running against it and restricting it in the rates it may charge. But, as to the rights of its many patrons to the enjoyment of reasonable and non-discriminatory charges, the fundamental scheme of all regulation is to entrust the same to the administrative discretion of an expert tribunal. Its administrative and legislative jurisdiction can be invoked by practically anyone and its proceedings are open to the whole public having an interest to intervene. An examination of the first few pages of some of the Commission's reports in its larger proceedings will demonstrate what a substantial portion of the public affected is in fact represented. The distinction between such proceedings and those of a judicial body which enforces the legal rights of the parties before it is obvious.

Appellants relied on the provision of section 22 (1) of the Act, that nothing in the Act shall in any way abridge or alter the remedies now existing at common law or by statute. But even with respect to damages it has long been settled that the Act read as a whole does alter preexisting remedies and

necessarily so unless said provision be taken practically to detroy its many provisions which place with the one body administrative discretion and judgment in matters legislative or administrative in nature. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Board* v. *Great Nor. Ry.*, 281 U. S. 412, 421–23, 429–30.

If as a basis for damages for past shipments the questions of reasonableness and justness are for the administrative body, all the more it must be true with respect to rates for the future. In short, as aforesaid, the right to the enjoyment of reasonable and nondiscriminatory rates for the future, either as advanced in support of existing rates or as support for a change in rates, is necessarily not assertable as a legal right in court.

This was recognized by the framers of the Act conferring jurisdiction upon the courts to enjoin and set aside orders of the Commission, in that it is designed as a jurisdiction to investigate whether the Commission had exceeded its statutory authority or acted arbitrarily, and to give to the courts power, on such grounds, simply to set aside the order without interference otherwise with the administrative processes or workings of the Interstate Commerce Act. Compare *Procter & Gamble* v. *United States*, 225 U. S. 282, at p. 293. As pointed out in the *Sprunt case*, it would be futile to set aside the command of the order where the carriers purposed to comply. No legal relief would

be afforded the shipper to bring his independent suit unless the courts' decrees could do more, that is, operate directly upon the rates or restrain the carriers' initiative. On the one hand, decisions in such independent suits, that the Commission had misconceived its authority, or acted without substantial evidence or essential findings in issuing its orders could supply grounds only for setting aside the orders and not for imposing restraint upon the carriers. The decisions would thus be merely "advisory", that is, extra-judicial. *Alabama* v. *Arizona,* 291 U. S. 286, 291. On the other hand, as bases for decrees operating directly on the rates or the carriers' rate initiative, there would have to be findings by the Courts as to the justness and reasonableness of the rates. Decrees of the Courts (made permanent and affirmed by this Court) operating directly on the rates, or on the carriers' rate initiative, would be destructive of the Act's administrative processes and workings and would, it seems inescapable, constitute the exercise of functions "essentially legislative or administrative." It is the final act which is determinative of the nature of the previous inquiry, whether judicial or legislative. *Louisville & Nashville R. R.* v. *Garrett,* 231 U. S. 298, 307; *Prentiss* v. *Atlantic Coast Line,* 211 U. S. 210, 227. In *Radio Commission* v. *General Electric Co.,* 281 U. S. 464, this Court, after referring to the dual authority which Congress has over the courts of the District

of Columbia and the extra-judicial powers with which said courts could be vested, said at p. 469:

> But this Court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only and can have no jurisdiction other than of cases and controversies falling within the classes enumerated in that article. It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative.

As distinguished from the extension by carriers of their lines or operations which is rigidly forbidden by the Act (Sec. 1 (18), (20)) unless Commission authority is first obtained, both in fact and as an authority validly issued (*Claiborne-Annapolis Ferry* v. *United States,* 285 U. S. 382, 392), the Act does not prohibit the carriers from changing their rates without Commission authority but, on the contrary, leaves with them their rate initiative, as has been described. In short there is no statutory mandate that the carriers may not change their rates unless first obtaining from the Commission an order or authority, validly issued after full hearings.

In the present case appellants can assert in court no legal right to have maintained either the 77-cent rate or any other particular rate, on which could be based a judicial decree operating on the

rates, either directly or through the carriers. And appellants can assert no legal right of their own as having been violated by the order's command upon the carriers, properly entitling them to maintain an independent suit to set aside the order. Legally appellants' position is no different than it would have been if the carriers had filed the rates without an order. The setting aside by the lower court of the order to establish the minima 90-cent rates would not have revived any statutory duty of the carriers to maintain existing rates; for there is no such duty. Compare *Claiborne-Annapolis Case, supra.*

Moreover, the lower court, assuming for the purposes of the case at least that it had jurisdiction, upheld the order on the merits, dismissed the bill, and vacated its temporary restraining order. Thereafter the carriers established the rates and they have been in effect since June 19, 1934. In the *Sprunt case, supra,* the shippers lost "standing" upon failure of the carriers to join with them in the appeal, and the fact that the rates were thereafter established was further held to render the matter moot in so far as relating to appellant shippers. Similarly as in that case, it is apparent that here a mandate of this Court directing the lower court to set the Commission's order aside would not restore the former rates. In this connection it is again emphasized that the carriers' rate initiative is not restricted by rigid statutory re-

quirement for hearings and an order of the Commission before changes in rates may be established; the invalidating of the order would bring to life no duty of the carriers to reestablish preexisting rates And, as for the lawfulness of the rates which the carriers have now made effective in their tariffs: that question can no more be directly raised in court in respect of the rates now effective than it could be in respect of any other of the carriers' established rates.

Even were there a rigid statutory requirement that existing rates may not be changed until, following full hearings, an order of the Commission has been obtained, this, in our view, would not give individual shippers, or consumers, (possibly a very minor portion of the carriers' patrons and public affected) *legal* right and standing to maintain in court an individual and independent suit to set aside the order.

## ARGUMENT ON THE MERITS

### I

**The Commission's order is within its statutory authority and is fully supported by the evidence and findings of the Commission**

As above said, the lower court reached no decision in respect of the standing of appellants, individual patrons of the carriers, to maintain a suit against the United States to set aside the Commission's order, but, assuming for the purposes of

the case that it had jurisdiction, the Court concluded on the merits that the Commission's order was in all respects a valid order.

It will be recalled that the Commission's order required the establishment of minima carload ex-river rates on bituminous coal of 90 cents per net ton from Conway and Colona, Pa., to Youngstown, Ohio. These were to supersede existing rates of 77 cents per net ton, which the Commission at the earlier hearings had found reasonable but had not required to be established and which, in fact, had not been established by the carriers until a considerable period after the rendering of the report. At the earlier hearings the carriers had proposed rates of $1.02 per net ton and at the rehearing advocated an increase of the 77-cent rate to substantially the all-rail basis, that is, to $1.01 per net ton. (R. 28, 29.) Intervening inland coal mines testified to their great disadvantage in selling coal in northeastern Ohio in competition with river mines using the ex-river rate, some showing that they had already lost their business in that territory and others testifying that if the 77-cent ex-river rate was continued they would be completely excluded from these important markets. (R. 29.) The carriers contended that the ex-river rates had in the past and did now seriously menace the all-rail rate structure to Ohio, and that a continuance thereof on a basis lower than the all-rail rate structure would encroach still further on their already de-

pleted revenues. (R. 28.) In justification of the proposed increase to $1.01 they not only relied upon comparisons with the key rates to the all-rail structure but upon comparison with individual rates. And the Commission's report particularly discusses some of these comparisons, and particularly makes the finding that (R. 32):

> The ex-river rates suggested (e. g., $1.01) by petitioners are consistent with the all-rail rates *prescribed or approved* by us for application in this same general territory both in the *Ohio* case and in other cases. (Italics ours.)

Briefly stated for present purposes the Commission's ultimate findings were that the ex-river rates had, in a great measure, deprived the inland mines of their markets in northeastern Ohio; that they had tended to disrupt the rate adjustment and jeopardized the carriers' revenues; that "the evidence indicates that they are too low and for that reason are unreasonable"; that they "are unreasonably low to the extent that they are or may be less than the following: From Colona and Conway to Youngstown 90 cents * * *" (R. 45); and that the maintenance of said ex-river rates on a basis less than certain named differentials under all-rail rates will constitute undue prejudice against "inland mines" and undue preference of river mines (R. 46).

Appellant's brief in this court asserts, in effect, that the facts and circumstances in the present case and the Commission's determinations are the same as those involved in *U. S. et al.* v. *C., M. St. P. & P. R. Co. et al.*, decided March 4, 1935 (not yet reported), in which this Court affirmed the action of a district court in setting aside an order of the Commission which had canceled certain reductions in rates proposed by said railroad. The findings of the Commission in that case were, substantially, that the proposed rates, if permitted to become effective, would lead to a disruption of the rate structure on coal, thus impairing the revenues of the carriers and their ability to provide efficient transportation service. There was also the finding "that the proposed rates would be unreasonable and in violation of Section 1(5) and 15a(2) of the Act." This latter finding, however, this Court said, when subjected to the test of a more particular statement of facts, was seen to be nothing more than a deduction from the preceding finding that if the rate reductions were established the result would be to disrupt the rate structure. Continuing the decision reads "This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from the carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help in the struggle." • • • "Plainly

such a disruption without more is no sufficient reason for prohibiting a change."

Following the above the Court points out, among other things, that there are no facts stated in the report indicating that it would be unjust or impracticable to apply the new bases of rates to other lines in Indiana; and that

> Even if the outcome for those lines is a diminution of the profits (the return being none the less compensatory), this without more does not make it wrongful for Milwaukee to restore the long standing parity between Brazil and Springfield. At the very least the findings should inform us, if only approximately, of the extent of the expected loss; they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. * * *.
> * * *.

Later on the decision, referring to the relation between the Indiana and Illinois groups, reads:

> * * * The Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between the Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion. * * *.

Thereafter the Court referred to the fact that the Commission had it within its power to re-

model the rate structure for all the carriers affected, whereas the only means available to the particular carrier to restore the parity was to initiate the rate reductions. The concluding paragraph of the decision reads in part:

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. * * *

In the instant case, even confining consideration to the Commission's finding that the ex-river rates had tended to disrupt the rate adjustment and jeopardize the carriers' revenues, the marked difference between the case and the *Milwaukee case, supra*, is apparent. The carriers were not proposing reduced rates to restore a former parity but were advocating increase of the ex-river rates to the basis of the general rate structure, contending that they seriously endangered the rate structure and that they were entirely too low measured by any proper standard. (Petition, R. 1197, 1192.)

And, as aforesaid, the Commission's report stated that (R. 32):

> The ex-river rates ($1.01) suggested by petitioners are consistent with the all-rail rates prescribed or approved by us for application in this same general territory both in the Ohio case and in other cases.

Another feature of the present case is that the ex-river rates had in fact started the crumbling of the Ohio intrastate rate structure, the Commission saying (R. 33):

> The approval of the ex-river rates from Conway and Colona to Youngstown impelled the Wheeling to propose ex-river rates from its River division to Cleveland, Lorain, Canton, and Massillon. As already indicated, these ex-river rates prompted the Wheeling to reduce its all-rail intrastate rates to Cleveland, Lorain, and other northeastern Ohio destinations effective August 1, 1932. The other trunk lines serving the eastern Ohio districts also reduced their all-rail intrastate rates, although it appeared that these reductions might disrupt the long standing differential relationships between interstate and intrastate movements as discussed in detail in the *Ohio case*. * * *

It also submitted that in the present case the Commission makes clear its belief that the impairment of revenues that would result from continuing the low ex-river rates would be extremely seri-

ous. Following a statement of the volume of coal consumed at destinations in northeastern Ohio the Commission's report reads (R. 41):

> "* * * The importance of this coal-rate adjustment and the relation between the ex-river and all-rail rates is magnified when the great volume of coal tonnage moving under those rates is considered. Coal carried to and through central territory during a normal year exceeds 100,000,000 tons, and from the standpoints both of tons carried and of revenues received, it is the largest single item of petitioners' traffic. Bituminous coal carried in 1932 constituted 44.01 percent of the tonnage and accounted for 29.79 percent of the revenues of the Pennsylvania, 51.73 and 32 percent, respectively, for the Baltimore & Ohio, and 62.0 and 56 percent, respectively, for the Pittsburgh & Lake Erie."[a]

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[a] Witness Kerr said (R. 969):

"I have given this somewhat elaborate description of this enormous rate structure largely to indicate how inseparable are the destination groups and to show that any disturbance in the all-rail rate adjustment as it now obtains, with the (29) specific approval of the Interstate Commerce Commission to the territory sometimes referred to as northeastern Ohio, including the M. and S. Valleys, Canton, Massillon, Akron, Cleveland, etc., can scarcely be held to that locality but must, if the existing and well established relationships explained are to be observed, be carried into affected territory and beyond it. The loss to the carriers through such [fol. 1369] reductions was, based upon my evidence in Docket 25566 and related cases, estimated at one and one-half million dollars for each cent of reduction based on the 1929 and

> Ex-river coal would compete with and may be used for the same purpose as all of the coals covered by the figures mentioned, except possibly low-volatile coals from the Outer Crescent, which coals constitute considerably less than 25 percent of the total consumption at these points. To some extent the ex-river coal may compete with and be used for the same purposes as low-volatile coals. The facts presented on the present record are somewhat at variance with those shown in the original cases. There it appeared that the ex-river rates were designed for and probably would move only special-purpose coal used in by-product coke ovens. The present record shows that substantial quantities of steam industrial coal, including that used in the production of electricity, have been diverted to barge-rail routes. * * *."

Furthermore, the Commission's findings and its whole report make clear that this is a case where the rates were shown and found to be, in and of themselves, unreasonably low; that it was because they were unreasonably low that they were unduly preferential; and that it was because they were both these things that they unfairly affected shippers and carriers, the rate structure and carrier revenue. Directly following its findings that the

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1931 tonnages, respectively. Such enormous losses will in all probability result unless the present ex-river rates are increased so as to protect the all-rail rate level which has just been approved by the Commission."

ex-river rates had tended to disrupt the rate structure, the report reads:

> * * * The view was expressed in the *Ohio case* that the difference between the ex-river rates and the all-rail basis of rates was too great. The evidence indicates that the ex-river rates are too low and for that reason are unreasonable. The Supreme Court said in *Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, at page 511: "Now the rate may be unreasonable because it is too low as well as because it is too high." Furthermore, in *Jefferson Island Salt Mining Co.* v. *U. S.*, 6 Fed. (2d) 315, we were sustained in prescribing minimum rates to preserve reasonable rate relationships.

In its formal findings, the Commission found that the ex-river rates "are unreasonably low to the extent that they are or may be less than" 90 cents, and unduly preferential and prejudicial to the extent that they "may be less than those based on 44 cents under the contemporaneous" all-rail rates from the Pittsburgh District. (R. 46.) Earlier in its report (R. 32) the Commission had compared the ex-river rates to Youngstown with the key rate from the Pittsburgh district to Youngstown. It pointed out that the later rate of $1.34 for 96.5 miles was 92.5 percent of the so-called Holmes and Hallowell scale; that the existing rate of 77 cents was about 82 percent for distances of 30 to 40 miles and 75 percent of said scale for dis-

tances of 40 to 50 miles. The weighted average haul from Conway and Colona to Youngstown is 42 miles. Thereafter the Commission's report reads (R. 32):

> In justification of the rates suggested by petitioners, rates ranging from $1.01 to $1.26 for distances of 40 to 55 miles within or near the Pittsburgh district are instanced. Rates ranging from 94 cents to $1.35 between points on the line of the Pennsylvania Railroad Company for distances of 20 to 50 miles are also shown. Actual movements under these rates have taken place. Rates of $1.01 and $1.13 for distances from 23.8 to 42.8 miles applying between points on the Pennsylvania, Panhandle division, and the line of the Pittsburgh, Chartiers & Youghiogheny Railway Company are also exhibited. A rate of 88 cents is shown for average distances of 27.7 miles over the line of the Pittsburgh and Lake Erie Railroad Company in the same general territory as the movement from Colona to Youngstown. All of these rates are as high as or higher, distance considered, than the suggested rate of $1.01 from Colona and Conway to Youngstown. Other all-rail rate comparisons of a similar nature were introduced.
>
> The ex-river rates suggested by petitioners are consistent with the all-rail rates prescribed or approved by us for application in this same general territory both in the Ohio case and in other cases. The suggested rate of $1.01 from Conway and Colona to

> Youngstown is also compared with the all-rail rate of $1.04 from the Leetonia group to Youngstown, for about the same distance, a portion of this origin group lying geographically between Conway and Colona on the one hand, and Youngstown, on the other.

The above comparison of existing rates and those proposed with the key rates of the coal rate structure, with the H. & H. distance scale, and with individual rates, is quoted to show that the Commission's determination rested on the rates themselves. The Commission's statement that other all-rail rate comparisons of a similar nature were introduced is a moderate statement of the evidence.[9] The 77-cent rate was plainly shown to be on a much lower basis than the general rate structure. It was a rate on a short 42-mile haul which included terminal service at Youngstown (R. 41) and assembling, classifying and weighing service at river transfer points (R. 39, 48).[10] These important items of costs, billing, bookkeeping and much other general expense remain the same regardless of length of haul.

Appellants appear to urge as grounds for setting aside the Commission's order the fact that it is inconsistent with its action in the *First Ex-River Case*. Usually, or at least frequently, the Commis-

[9] R. 980–983; R. 970–973; R. 963; Ex's. F-27 to F-29, R. 1425, Historical statements of coal rates. Rate Comparisons on rehearing Ex's. F-7 and F-8, R. 1393–1401; F-9, F-10 and F-25, R. 1402, 1405, 1422, 1423.

[10] R. 1012–1024; 1007–1012; 1025.

sion's action, following the rehearing of a case, or even following reconsideration, is different from its original action. Aside from the fact that that is not grounds for setting aside an order, it should be again emphasized that the Commission refrained from issuing an order in the *First Ex-River Case.* At that time information as to factors which are usually before it with respect to well established service could at best be submitted only speculatively, or were altogether undeterminable.

As above shown, the Commission in raising the 77-cent rates exercised its minimum rate power, prescribing a rate not lower than 90 cents and at the same time stating that the proposed $1.01 rates advocated by the carriers and supported by much evidence were not inconsistent with the all-rail rates prescribed or approved by it in the same general territory. The Commission's minimum rate power was given to it, not alone to prevent preferential rates but also to protect carrier revenue and that carries with it a reasonable basis in the rates operated on by the order. This is demonstrated by the fact that, similarly as in the case of section 13 State rate cases, the power was given to it at the same time that section 15a encharged the Commission in terms with the duty of giving consideration to carrier revenue.

As further distinguishing the present case from the *Milwaukee case,* the order is supported by the fact and finding that the ex-river rates gave undue

preference to river mines and subjected inland mines to undue prejudice. The undue prejudice against interstate commerce found to exist in the *Ohio case,* 192 I. C. C. 413 (sustained in *Ohio* vs. *United States,* 292 U. S. 498), was ordered removed by the Commission by increasing the intrastate rates; that is to say, the Commission there, in effect, fixed minimum rates to remove undue preference and prejudice. That, in substance and in fact, was what the Commission again did to remove undue preference and prejudice found to exist in the present case.

In the *First Ex-River case* the Commission did not have before it testimony in respect of the competitive necessities of inland operators as opposed to river operation. (R. 236.) On rehearing witnesses for inland operators, including members of the Western Pennsylvania Coal Traffic Bureau, appeared and showed the serious consequences and damages introduced by the ex-river rates which the Commission had suggested (R. 1028–1031, 1031–1034, 1059–1065, 1065–1067, 1067–1070). It was shown and found (R. 39, 43) that ex-river coal requires and receives exactly the same transportation operations and services as coal handled direct by rail from mines (1013, 1014, 1010, 1011). (See 197 I. C. C. 617, 628, 629, 632.)

The testimony at the first hearings was not directed to rates necessary to avoid undue prejudice and preference as between ex-river transfer points

on the one hand and inland mines on the other hand. At the rehearing the testimony was directed to this feature as well as the level. (R. 29, 32; R. 1028–1031, 1031–1034, 1059–1065, 1065–1070.) A great deal of the Commission's report is devoted to the discussion of the discrimination against inland mines caused by the ex-river rates, and in this connection it should be noted carefully that the Commission rests its conclusions on the plainly low basis of the rail rates themselves. There is no room for appellants' contention that the order takes either from owners of river mines or from consumers their geographical advantage of location. Such argument would seem to resolve itself into the contention that the Commission had not properly weighed and balanced service against rates; that is to say, it is a contention that is always inherent in any complaint of consumer or producer with respect to the rates from points of production or consumption.

As shown in the preliminary statement of this brief (p. 14) the Commission report discusses the evidence introduced with respect to the barge charges for river movements to transfer points, the most representative charge appearing to be 25 cents per net ton. Appellants made contentions as to greater costs based on one river mine and a seemingly unreliable cost study (R. 37). On the other hand the railroad contended that the 25-cent charge, being on single barge lots, was not pro-

bative of the charge on steady and increased tonnage. They supported this contention by testimony as to comparisons of bids obtained by the City of Cleveland for an annual supply of 100,000 tons of coal. However, taking the 25-cent barge charge as "indicative" (see Note 2, Table, R. 37) and adding to that the transfer charge of 12 cents and the 90-cent ex-river rate prescribed there was "still left a substantial disparity of rate between the all-rail haul and the combined river and rail movement in favor of the latter." (Lower Court opinion, R. 135.) The 12-cent charge for transferring coal from barges to cars is no part of the rail rates here involved.

The Commission's report mentions (R. 44) that it is "the policy of Congress as declared in Section 500 of the Transportation Act to promote, encourage, and develop both rail and water transportation services and facilities", and states its belief that it is its duty "to carry out that policy *consistent with existing law.*" The Commission had earlier said (R. 38) that the evidence concerning the barge charges is shown merely for informative purposes. The information was introduced and accepted, and properly so, it is believed, before a body such as this Commission. Its showing is, in fact, still further demonstration, if any is needed, that the Commission's action was based on the ex-river rate and the service thereunder. In this connection mention is made in the

lower court's statement (R. 137) that the Commission's opinion demonstrated its view

> that the ex-river rate of $1.02 sought by the trunk-line roads was by comparison with all-rail rates, and in the light of other evidence, a reasonable rate. Notwithstanding it fixed the minimum rate at 90 cents.

## CONCLUSION

It is respectfully submitted that the decree of the lower court denying the prayer of and dismissing the bill should be affirmed.

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APRIL 1935.

## APPENDIX

Pertinent in the consideration of the case are the following provisions of the Interstate Commerce Act (U. S. Code, Tit. 49) and the Transportation Act, 1920 (U. S. C., Tit. 49, sec. 142):

### Interstate Commerce Act

SECTION 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *

SECTION 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own

initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classifi-

cation and shall conform to and observe the regulation or practice so prescribed.

SECTION 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto, as would be proper in a proceeding initiated after it had become effective. * * *

SECTION 15 a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the

need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

**Transportation Act, 1920**

SECTION 500. It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

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